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No. 87-2100

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Petitioner,

– against –

GROUP W. CABLE, INC. and CITY OF NEW YORK,

Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DIVISION, FIRST DEPARTMENT,
OF THE SUPREME COURT OF THE STATE OF NEW YORK

MEMORANDUM OPPOSING CERTIORARI

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Jean Loretto requests plenary consideration of a claim for attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, that prior decisions of this Court have resolved against her in every respect.

Ms. Loretto seeks the attorney's fees from Group W Cable, the City of New York and the State of New York (A. 24 [June 25, 1985 supreme court opinion][1]), all styled by the petition (at 1) as "opposing parties." She incurred the fees in an action

[1] References preceded by "A." are to pages of the appendix to the petition.

against Group W's predecessor-in-interest and the City in which she alleged, *inter alia*, that the cable television company's installation of equipment necessary for its service in a building that she owned constituted a taking of her property without just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 98 Misc. 2d 944 (Sup. Ct. N.Y. Co. 1979), *aff'd*, 73 A.D.2d 849 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 124 (1981), *rev'd and remanded*, 458 U.S. 419 (1982), *on remand*, 58 N.Y.2d 143 (1983). *See* A. 3-4 (appellate division opinion).

New York Executive Law § 828(1), which Ms. Loretto challenged as unconstitutional, authorized the installation of the equipment, and, provided at subdivision (b), before the action was commenced in 1976, as now, that a landlord's compensation for the installation could not exceed the amount the New York State Commission on Cable Television, by regulation, determines to be reasonable. On January 15, 1976, also before the action was commenced, the Commission informed landlords that it would construe § 828(1)(b) to "assure" them "just compensation" which, given the "negligible unoccupied space" used for cable television installations, would be nominal "in the absence of a special showing [to the Commission] of greater damages attributable to the taking." Commission Statement of General Policy (Jan. 15, 1976). On August 27, 1976, the Commission set the "reasonable fee" under § 828(1)(b), now termed "just compensation," at $1.00 "absent a special showing [to the Commission] of greater damages attributable to the taking." Commission Clarification of General Policy (Aug. 27, 1976).

The Attorney General appeared in the case on three occasions: when it first was before the New York Court of Appeals, 53 N.Y.2d at 130, 132; when it was before this Court, 458 U.S. at 421 n.*; and when it was before the Court of Appeals on remand from this Court, 58 N.Y.2d at 146. He appeared in the Court of Appeals as intervenor under New York Executive Law § 71,[2] and he appeared in this Court as an *amicus curiae*

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[2] Executive Law § 71 entitles the Attorney General to intervene in any action or proceeding in which the constitutionality of a New York statute is

(Footnote Continued)

under Supreme Court Rule 36. All of his appearances were in support of the constitutionality of Executive Law § 828(1). See n.2.

Only a "prevailing party" can recover attorney's fees under 42 U.S.C. § 1988, and Ms. Loretto does not satisfy the definition. As this Court said in *Hewitt v. Helms*, 97 S.Ct. 2672, 2675 (1987), "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of [her] claim before [she] can be said to prevail [under § 1988]." *Accord, Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (interlocutory award of fees under § 1988 only available to party who has established an entitlement to some relief on the merits). Ms. Loretto has yet to establish the § 1983 claim against Executive Law § 828 (1) on which she relies (petition at 22, 27-33), much less receive any relief on its merits.

Under this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985), Ms. Loretto's § 1983 claim requires: 1) a taking of her property under color of state law; and 2) the denial of just compensation. *Id.* at 194 ("[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation"); *id.* at 194-95 ("[i]f the government has provided an adequate process for obtaining compensation [for a taking of property,]... claims against the ... [g]overnment are premature until the property owner has availed [herself] of the process").

Ms. Loretto met the first prong of the *Williamson* test when this Court reversed the New York Court of Appeals, holding that the installation of cable television equipment in her building constituted a 'taking.' 458 U.S. at 438, 441. But, she has not met

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"brought into question," and it imposes a "duty" on him, if he intervenes, to support the constitutionality of the statute.

Executive Law § 71 does not confine the Attorney General's appearance to constitutional arguments. For example, he may urge issues that obviate the need for constitutional adjudication and did so in his first appearance in the Court of Appeals in this case when, at the direction of the court, he briefed Ms. Loretto's standing to challenge the constitutionality of Executive Law § 828(1).

the second prong of the test since she never applied to the Commission for a "reasonable fee" or "just compensation." See p.2. Nor has she shown that the Commission's process for obtaining "just compensation" is inadequate under *Williamson*. *See, e.g.*, petition at 23-24 (suggesting that Commission's process is time-consuming and attorney's fees might not be available); *id.* at 29-30 (suggesting that Commission's process is an administrative remedy that need not be exhausted on a § 1983 claim); *id.* at 29-33 (suggesting that Commission's process was established only after this Court's decision). *Contrast* Commission Statement of General Policy (Jan. 15, 1976) and Commission Clarification of General Policy (Aug. 27, 1976) (both describing pre-litigation Commission process).

Thus, when Ms. Loretto 'won' her case in this Court, all she obtained was the right to proceed on the second prong of the *Williamson* test, no more than the plaintiffs in *Hanrahan v. Hampton*, who were not "prevailing part[ies]" under § 1988, obtained when directed verdicts adverse to them, were reversed, *i.e.*, the right to proceed on the substance of a § 1983 claim. 446 U.S. at 755, 758-59. Indeed, Ms. Loretto obtained less than the *Hanrahan* plaintiffs since her complaint was dismissed, *see Hewitt v. Helms*, 107 S. Ct. at 2675-76 (plaintiff whose complaint was dismissed, not "prevailing party" even if lawsuit was catalyst for subsequent governmental action), and, given the availability of the damages attributable to a 'taking' in the Commission's process, it is unlikely that she will be able to meet the second prong of the *Wiliamson* test if she does apply for compensation. *See* A. 13 (appellate division opinion).

Only a defendant who has been "prevailed against" can be liable for attorney's fees under § 1988, and neither the "opposing parties" (petition at 1) nor the State of New York satisfy the definition. *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 3104 (1985). As this court said in *Graham*, "liability on the merits and [liability]. . . for fees [under § 1988] go hand in hand." *Id.* "Section 1988. . .does not create fee liability where merits liability is non-existent let alone [liability on]. . .a nonparty," the status of the State of New York in this case. *Id.* at 3106.

Given Ms. Loretto has yet to establish the § 1983 claim on which she relies, see pp. 3-4, none of the opposing parties is liable to her under § 1988 because none is liable to her on the "merits." *Kentucky v. Graham*, 105 S. Ct. at 3104, 3106. The State of New York and the Attorney General are not liable to Ms. Loretto for other reasons as well.

As this Court said in *Kentucky v. Graham*, 105 S. Ct. at 3104, a defendant cannot be "prevailed against" under § 1988 if he has a "legal immunity" from the underlying civil rights suit. *Accord, Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980) (vacating judgment on merits and award of § 1988 fees against judges of the state supreme court who, in context of case, had absolute legislative immunity). In *Graham*, this Court gave the Eleventh Amendment as one example of immunity from an underlying civil rights suit and, perforce, an award of fees under § 1988. 105 S. Ct. at 3107. The example applies to the State of New York here, the only state entity from which Ms. Loretto, in fact, seeks fees (A. 24).

New York's Eleventh Amendment immunity from Ms. Loretto's claim for fees under § 1988 extends to the Attorney General who, if he was a 'party' to the underlying suit, acted for the State when he submitted his briefs. See pp. 2-3 & n.2. *See Kentucky v. Graham*, 105 S. Ct. at 3105 (acts of a government officer in his official capacity are acts of the government itself). Even if the Attorney General is viewed as having acted in his personal capacity, the State, the entity from which fees are sought for his conduct (A. 24), could not be liable on Ms. Loretto's claim. *Kentucky v. Graham*, 105 S. Ct. at 3106 (nothing in the history of § 1988 suggests that fee liability, unlike merits liability under § 1983, can be imposed on a *respondeat superior* basis).

In sum, Ms. Loretto's claim for fees under § 1988 against the State of New York and the Attorney General is no more than a money claim barred by the Eleventh Amendment. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

Therefore, the petition for a writ of certiorari should be denied.

New York, New York
August 23, 1988

Respectfully submitted,

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